BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVA MANZANAREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,725
HAYES COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the December 3, 2007, Review and Modification Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on February 15, 2008, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Ryan Weltz of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Review and Modification Award. Additionally, at oral argument before the Board the parties agreed the appropriate date of accident for determining claimant's benefits for this repetitive trauma injury is May 24, 2001. They also stipulated the record included the transcript of claimant's April 5, 2004, settlement hearing along with attached medical records, which included Dr. Robert L. Eyster's December 13, 2002, office notes and Dr. Pedro A. Murati's January 13, 2003, medical report.

ISSUES

Claimant initiated this review and modification proceeding to request additional disability benefits. On April 5, 2004, a Special Administrative Law Judge approved the terms of a settlement agreement that awarded claimant the lump sum of $36,000, which approximated a 42 percent work disability. The terms of the settlement, however, preserved claimant's right to seek additional medical benefits and to seek review and modification of the award. On March 7, 2005, the Division of Workers Compensation received claimant's application for review and modification.

In the December 3, 2007, Review and Modification Award, Judge Barnes increased claimant's work disability to a 57.5 percent work disability for a 57 percent task loss and a 58 percent wage loss.

Claimant contends Judge Barnes erred. Claimant argues she is permanently and totally disabled and, therefore, she is entitled to receive permanent total disability benefits. In the alternative, claimant contends her work disability has increased to 95 percent, which represents a 90 percent task loss and a 100 percent wage loss. Consequently, claimant requests the Board to increase her disability benefits.

Conversely, respondent argues claimant has failed to prove she has suffered any increased impairment and also failed to prove her April 5, 2004, award is inadequate. Respondent also argues claimant has failed to prove she is permanently and totally disabled from performing any substantial, gainful employment. Accordingly, respondent requests the Board to find claimant failed to prove she is entitled to a modification of her April 5, 2004, award.

The issues before the Board on this appeal are:

1. Has claimant proven there has been a change in either her functional impairment or ability to work that would justify modifying her April 5, 2004, award?

2. If so, what is the extent of claimant's present disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant is a legal resident who came to the United States from Nicaragua in 1992. She has limited English language skills. After arriving in the United States, claimant

worked for various employers and in 2000 began working for respondent. While employed by respondent, claimant injured her left knee and later developed symptoms in both upper extremities, which was diagnosed as bilateral carpal tunnel syndrome. After undergoing surgery for the carpal tunnel syndrome, claimant entered into a settlement with respondent and received a lump sum award. Claimant initiated this review and modification proceeding because she now contends her condition has worsened.

The April 2004 settlement and award

As indicated above, at an April 5, 2004, settlement hearing claimant was awarded a 42 percent work disability, which equated to $36,000.[1] The settlement hearing transcript does not set out with any specificity the injuries that were compensated. But the award specifically excluded a knee injury that claimant had sustained. Nonetheless, the medical records attached to the settlement hearing transcript indicate claimant's award was primarily for bilateral upper extremity injuries as those records mainly focus upon claimant's upper extremities and the impairment ratings for bilateral carpal tunnel syndrome.

The first medical record attached to the settlement hearing transcript was from Dr. Robert L. Eyster. The doctor's December 13, 2002, office notes indicated claimant was complaining of pain in her neck, right shoulder, lower back, both forearms, and knee. Dr. Eyster rated claimant's upper extremities and found she had a five percent whole person impairment for bilateral carpal tunnel syndrome. (The doctor also indicated he had previously rated her knee.) Moreover, the doctor stated claimant could return to her regular work but, if she is symptomatic, she should avoid repetitive activities with her hands and also observe certain lifting restrictions. It is not clear from Dr. Eyster's notes, however, whether the lifting restrictions pertained to claimant's upper extremities or her lower back complaints.

The other medical report attached to the settlement hearing transcript was from Dr. Pedro A. Murati. In that January 13, 2003, report, Dr. Murati indicated claimant had pain and swelling in both hands and her left knee. The doctor noted that in July 2002 claimant had undergone a left knee replacement followed by bilateral carpal tunnel release surgeries in November 2002. In addition to rating the left knee, Dr. Murati found claimant's right upper extremity injury comprised a 10 percent upper extremity impairment or a six percent impairment to the whole person. Likewise, the doctor found claimant's left upper extremity injury comprised a 10 percent upper extremity impairment or a six percent impairment to the whole person. Combining the impairment ratings for the upper extremities, the doctor concluded claimant had sustained a 12 percent whole person impairment.

[1] S.H. Trans. at 7.

Dr. Murati's report also sets forth numerous restrictions the doctor recommended for claimant's upper extremities. Those restrictions included never lifting over 10 pounds, limiting occasional lifting to 10 pounds, limiting frequent lifting to two pounds, no climbing ladders, no crawling, no repetitive grasping or grabbing, no heavy grasping, limiting repetitive hand controls to occasionally, no hooks or knives, and no vibratory tools.

Dr. Murati's January 13, 2003, report indicates he utilized the AMA *Guides*[2] to rate claimant's functional impairment. Dr. Eyster's December 13, 2002, medical notes neither mention the *Guides* nor indicate any other source the doctor used to rate claimant's impairment.

Post-award medical treatment

Claimant did not return to work following the April 2004 settlement and award. Nevertheless, claimant continued to experience problems with her arms. Claimant, however, requested additional medical treatment and in April 2005 began treating with Dr. Federico Gonzalez, who is board-certified in both plastic surgery and hand surgery.[3] The doctor diagnosed bilateral carpal tunnel syndrome and bilateral tenosynovitis, both of which he related to claimant's initial compression syndrome. In addition, the doctor noted claimant had neck pain, which he also related to claimant's carpal tunnel syndrome. The doctor testified, in part:

> Well, I felt that she had carpal tunnel syndrome in both upper extremities and also inflammation of the tendons or tenosynovitis in both upper extremities.[4]
>
> . . . .
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> My opinion is it [claimant's neck complaints] was most probably the result of the carpal tunnel syndrome. We often find that the pain that patients with carpal tunnel syndrome exhibit can extend up into the shoulder or neck region due to compression of the nerve distally. And that was my feeling then.[5]

Despite her earlier surgeries, nerve conduction studies indicated claimant had mild to moderate bilateral carpal tunnel syndrome. Dr. Gonzalez offered claimant a second

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Gonzalez Depo. at 4.

[4] *Id.* at 5, 6.

[5] *Id.* at 10.

round of carpal tunnel release surgeries. And in September 2005, Dr. Gonzalez operated on claimant's right arm and performed a right carpal tunnel release and a flexor tendon tenosynovectomy. In October 2005, he operated on claimant's left arm and performed a left carpal tunnel release and a flexor tendon tenosynovectomy.

In February 2006, Dr. Gonzalez concluded claimant had reached maximum medical improvement and released claimant from treatment.

In June 2006, after Dr. Gonzalez' treatment had ended, claimant began treating with Dr. John P. Estivo. The doctor was approved to treat claimant only for her cervical spine and bilateral shoulder complaints, which were allegedly caused from repetitively lifting wrought-iron garden equipment while working for respondent. After initially diagnosing right shoulder pain, mild left shoulder strain, cervicalgia and status post bilateral carpal tunnel releases, the doctor recommended an MRI of claimant's cervical spine and one of her right shoulder. The MRI of the cervical spine was normal. But the MRI of the right shoulder showed some ganglion cysts, a possible glenoid labral tear, and some arthritis in the AC joint.[6]

Dr. Estivo prescribed physical therapy for claimant's cervical spine and recommended an arthrogram on her right shoulder, which did not reveal a torn rotator cuff but showed some tendinitis and bursitis. At that point, Dr. Estivo diagnosed cervical spine strain and right rotator cuff tendinitis. He then injected claimant's right shoulder and prescribed physical therapy for both claimant's neck and shoulder.

Claimant last saw Dr. Estivo on August 31, 2006. She was still having some cervical spine pain and the doctor diagnosed her as having cervical spine strain and right shoulder rotator cuff tendinitis.

Claimant's last appointment with Dr. Estivo ended her medical treatment. Claimant, however, met with Dr. Pedro A. Murati in October 2006 for a second time. At that time, she complained of pain in both shoulders, right worse than left, occasional pain and stiffness in her neck, cramping and locking in her fingers in both hands, swelling in the middle fingers on both hands, swelling and pain in both wrists, pain in her right upper arm, and pain and stiffness in her right shoulder blade. Dr. Murati diagnosed right rotator cuff tear, myofascial pain syndrome affecting the bilateral shoulder girdles and extending into the cervical and thoracic paraspinals, and status post bilateral carpal tunnel releases.

During her February 2007 review and modification hearing, claimant testified her arms were inflamed and very weak. She also testified her back was very bad and she had

[6] Estivo Depo. at 10.

to use many pillows to sleep and that her shoulders were similar to her back. According to claimant she can use her hands 10 or 15 minutes before she must rest them for 20 or 30 minutes. She testified, in part:

> For example, maybe I'll start washing dishes, soaping them, I'll put some warm water in and I'll start rinsing the plates and I'm trying to put the plates away, and I'll feel that my hands are locking up and I'm not able to put them where they should be.
>
> . . . .
>
> For example, I'm doing things and -- one example, okay, I'll grab a broom and I'll try and sweep, even though it's really hard, so I will go sweeping, sweeping, but then suddenly -- then suddenly I'll have so much pain I'll just have to just stop and leave it.[7]

As of February 2007, claimant had not looked for work since her April 5, 2004, award.[8] Claimant's testimony at the review and modification hearing is uncontradicted that she applied for Social Security disability benefits and was found disabled but she was denied those benefits because she had not lived in the United States long enough.

Claimant's present functional impairment, restrictions, and task loss

As indicated above, in February 2006, Dr. Gonzalez concluded claimant had reached maximum medical improvement. The doctor rated claimant under the AMA *Guides* as having a 10 percent impairment to her right upper extremity and a seven percent impairment to her left upper extremity.[9] More importantly, the doctor concluded that claimant was unable to handle weights greater than 10 pounds without significant pain and that she was limited in her ability to perform repetitive motion activity without pain. Accordingly, the doctor recommended corresponding work restrictions. The doctor testified, in part:

> Q. (Mr. Ratzlaff) All right. And when you say "restricted," Doctor, do you mean that she should be restricted from performing any repetitive motion activity and doing any lifting of greater than 10 pounds, or is there a portion of the day that she could do repetitive activity, or lift more than 10 pounds?

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[7] R.M.H. Trans. at 10.

[8] *Id.* at 16.

[9] Gonzalez Depo. at 15.

> A. (Dr. Gonzalez) No. Usually, we -- when we classify that, 10-pound is the limit of weight. The repetitive activity would be more than six repetitive motions within each minute. And a rest of at least 10 minutes every two hours, if performing repetitive motion activity.
>
> So it was not absolute, but it is qualified.[10]

In a February 16, 2007, letter to respondent's attorney, Dr. Gonzalez expressed a similar opinion that claimant's functional capacity was limited due to the pain she was experiencing in both upper extremities and he opined that "she [would] be restricted from performing significant activity repetitively with weights of greater than 10 pounds in each upper extremity and she [would] be restricted in her ability to perform repetitive motion activity."[11] Moreover, the doctor noted they were unable to significantly relieve claimant's tenosynovitis although they significantly improved the "nerve compression syndromes" in her upper extremities.[12] And he recommended claimant undergo a functional capacity evaluation to determine her capabilities.

At respondent's request, Karen Crist Terrill prepared a list of work tasks that claimant allegedly performed in the 15 years before developing her bilateral upper extremity injuries. After reviewing the list, Dr. Gonzalez concluded claimant had lost the ability, excluding duplicate tasks, to perform seven of 41 former tasks, or 17 percent.

Dr. Gonzalez had no opinion whether claimant had any functional impairment due to her alleged shoulder and neck symptoms.

Claimant's treatment with Dr. Estivo ended in late August 2006. Because of continuing tenderness and spasm in her cervical spine, Dr. Estivo felt claimant had an impairment and, therefore, he rated her as having a five percent whole person impairment for cervical spine strain under the AMA *Guides*. Conversely, the doctor did not believe claimant had any impairment due to her right shoulder. The doctor recommended that claimant permanently limit overhead work for no more than one-third of a full workday.[13] Nonetheless, after reviewing Ms. Terrill's task list, Dr. Estivo felt claimant could perform all of the tasks without violating the restriction he recommended for claimant's cervical injury.[14]

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[10] *Id.* at 19, 20.

[11] *Id.*, Ex. 1.

[12] *Id.*

[13] Estivo Depo. at 15 and Ex. 2.

[14] *Id.* at 17.

Dr. Estivo did not recommend any restrictions for claimant's right shoulder as he assumed that condition would completely resolve. He acknowledged, however, he has not seen claimant since August 2006 and, therefore, he does not have any knowledge of her present condition. He also testified that AC joint arthritis is an extremely common finding in claimant's age group.

The last doctor to see and evaluate claimant was Dr. Pedro A. Murati, who was hired by claimant's attorney and last evaluated claimant in October 2006. As indicated above, the doctor diagnosed right rotator cuff tear, myofascial pain syndrome affecting the bilateral shoulder girdles and extending into the cervical and thoracic paraspinals, and status post bilateral carpal tunnel releases.

Using the AMA *Guides*, Dr. Murati rated claimant as having a 20 percent right upper extremity impairment for the carpal tunnel syndrome and release and a five percent upper extremity impairment for the loss of range of motion in the right shoulder, which combine for a 24 percent upper extremity impairment or a 14 percent whole person impairment. The doctor rated claimant's left upper extremity impairment at 20 percent for the carpal tunnel syndrome and release and at three percent for the loss of range of motion in the shoulder, which combine for a 22 percent upper extremity impairment or a 13 percent whole person impairment. The doctor also found claimant had a five percent whole person impairment for myofascial pain syndrome affecting the cervical paraspinals and a five percent whole person impairment for the myofascial pain syndrome affecting the thoracic paraspinals. In all, Dr. Murati determined claimant had a 33 percent whole person impairment.

More importantly, Dr. Murati recommended claimant observe the following work restrictions and limitations:

> Well, the restrictions being in an 8-hour day, no ladders, crawling, repetitive hand controls, grasp/grab, no heavy grasp with both hands. No above shoulder level work; no lift/carry push/pull greater than ten pounds, that occasionally, and only five frequently. No work more than 18 inches away from the body, both arms. Avoid awkward positions of the neck. Use wrist splints while working. No use of hooks or knives or vibratory tools for both hands and no keyboarding at all, and that she was essentially and realistically unemployable.[15]

In short, Dr. Murati felt claimant was realistically unemployable as "[f]unctionally, she has no hands."[16]

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[15] *Id.* at 11.

[16] *Id.*

Reviewing the list of former work tasks prepared by claimant's vocational expert, Doug Lindahl, Dr. Murati found claimant had lost the ability to perform 22 of 24 non-duplicative former tasks, or 92 percent, due to her upper extremity (including shoulder) injuries.

Assuming claimant left respondent's employment and she never returned to work requiring repetitive grabbing or grasping, Dr. Murati believes scar tissue from the old injury probably formed and made the second round of claimant's carpal tunnel release surgeries necessary.

Vocational expert opinion

At claimant's attorney's request, Doug Lindahl met with claimant in February 2003, which is more than a year before the April 2004 award. For purposes of this review and modification proceeding, Mr. Lindahl was asked to consider Dr. Murati's more recent opinions. Upon considering only the restrictions provided by Dr. Murati after the doctor's October 2006 evaluation, Mr. Lindahl concluded it was unlikely claimant was employable. Mr. Lindahl testified, in part:

> Q. (Mr. Seiwert) And in view of the restrictions that Dr. Murati placed on her at that time [October 2006], do you have an opinion about whether or not Ms. Manzanarez would be able to perform full-time competitive employment?
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> A. (Mr. Lindahl) As you recall, she is a sixth grade educated individual from Nicaragua with some cosmetology training and no English skills, at least at the time I visited with her. She is limited to sedentary work and no repetitive hand controls or grasping or reaching beyond 18 inches from the body. With that combination of hand restrictions and at a sedentary, unskilled level, there are no jobs that I can think of that she could compete for.
>
> Q. Okay. When you originally evaluated Ms. Manzanarez with the earlier restrictions that she had, did you have an opinion about whether she was employable at that point?
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> A. Well, at that time, as it said in my report, she was still fairly significantly handicapped, and I thought that she would need help finding work. I didn't list any jobs, but it was my opinion that she wasn't unable to work, she just would need help based on her circumstances.
>
> Q. And that opinion has changed since that time?

> A. At this point in time with the severe hand restrictions, I don't think even with help she could find work.[17]

Respondent hired vocational expert Steve Benjamin to analyze the work restrictions provided by Dr. Gonzalez and Dr. Murati to determine how those might affect earlier task and wage loss opinions provided by Ms. Terrill. Mr. Benjamin testified claimant retained the ability to earn $6 per hour considering Dr. Gonzalez' work restrictions, which was the same wage Ms. Terrill found in January 2004. Moreover, Mr. Benjamin agreed claimant would be unable to perform any of her past jobs as they are normally performed in the national economy without violating Dr. Murati's restrictions and that she was not employable under those restrictions.

The Board notes Mr. Benjamin was asked about claimant's task loss percentages considering various doctors' restrictions. Claimant objected to those questions. Those objections are sustained as K.S.A. 44-510e(a) requires a worker's task loss percentage to be provided by a physician. That statute reads, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, *in the opinion of the physician,* has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . .[18]

CONCLUSIONS OF LAW

The greater weight of the evidence establishes that claimant's physical condition has deteriorated following the April 2004 award. Since that award claimant underwent another round of bilateral carpal tunnel release surgeries. Claimant testified that she is now unable to work as her hands begin locking after only several minutes of work. Moreover, Dr. Murati found claimant was essentially and realistically unemployable. That testimony is credible and persuasive.

Claimant is an unskilled worker. Because of her limited education and limited English language skills, claimant's labor market was relatively restricted before she was injured at work. But because of her worsened condition and the related loss of ability to work her labor market has vanished. Even Dr. Gonzalez recognized he was not able to relieve claimant's tenosynovitis and that her functional abilities were limited due to her

[17] Lindahl Depo. at 4, 5.

[18] K.S.A. 44-510e(a) (emphasis added).

ongoing bilateral upper extremity pain. Moreover, the doctor indicated claimant should be restricted from performing significant repetitive activity with her hands.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[19]
>
> In workers compensation cases, the existence, extent, and duration of an injured worker's incapacity is a question of fact for the trial court to determine.[20]
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> . . . where the evidence of the examining physicians concerning a workman's condition was that he was essentially unemployable, and the evidence of the vocational rehabilitation experts was that it would be difficult for him to obtain any type of employment due to his age and physical restrictions, there was a substantial basis of fact from which the trial court could reasonably find the workman was completely and permanently incapable of engaging in any type of substantial and gainful employment under K.S.A. 1992 Supp. 44-510c(a)(2).[21]

The Board concludes claimant is essentially unemployable and unable to perform substantial and gainful work in the open labor market.[22] Accordingly, claimant is now entitled to a modification of her April 5, 2004, award. Claimant is now entitled to receive permanent total disability benefits commencing September 29, 2004, which is the date the 42 percent permanent partial general disability awarded in the April 5, 2004, award would have paid out had it been paid by the week rather than in a lump sum.

AWARD

WHEREFORE, the Board modifies the December 3, 2007, Review and Modification Award to grant claimant permanent total disability benefits commencing September 29, 2004.

Claimant received $36,000 for a 42 percent permanent partial general disability under the April 5, 2004, award.

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[19] K.S.A. 44-510c(a)(2).

[20] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, Syl. ¶ 1, 872 P.2d 299 (1993).

[21] *Id.* at Syl. ¶ 5.

[22] See *Wardlow*, *supra*, where the Kansas Court of Appeals affirmed the trial court which found the worker was permanently and totally disabled based in part on expert medical testimony that the worker was "essentially and realistically unemployable."

For the period commencing September 29, 2004, based upon an average weekly wage of $308.80, Ms. Manzanarez is entitled to receive 432.29 weeks of disability benefits at $205.88 per week, or $89,000, for a permanent total disability and a total award not to exceed $125,000.

As of April 18, 2008, in addition to the $36,000 paid to Ms. Manzanarez per the April 5, 2004, award, 185.43 weeks of permanent total disability benefits at $205.88 per week, or $38,176.33, are due and owing, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $50,823.67 shall be paid at $205.88 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Review and Modification Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the above opinion of the Board. The majority's opinion that claimant is permanently and totally disabled is, to a large degree, based on the opinion of Dr. Murati. The undersigned does not find Dr. Murati to be credible in this instance. Dr. Murati initially testified that claimant's present problems were related to her continued work for respondent. However, when Dr. Murati was informed that claimant had not worked since 2001, he changed his opinion, claiming claimant's increased

symptoms were probably caused by scar tissue from her surgeries. This reversal of opinion was apparently intended to maximize claimant's impairment. It is clear that Dr. Murati was hired and intended to aid claimant in obtaining workers compensation benefits and his opinion varied, depending on how he could best aid claimant's quest for benefits.

Both Dr. Gonzalez and Dr. Estivo were treating physicians for claimant and thus, had a better understanding of claimant's injuries and how she was affected by those injuries. While both found claimant to have limitations and restrictions from her work-related injuries, neither found claimant to be permanently and totally disabled. The undersigned would, therefore, find that claimant's entitlement to an award is limited to her 42% work disability as was stipulated to at the settlement hearing held in April 2004. This Board Member is aware that *Casco*[23] holds that bilateral upper extremity injuries are to be compensated as two separate injuries under the schedule of K.S.A. 44-510d(a). However, as claimant was initially awarded a 42% work disability, that finding and conclusion became the law of the case.[24] Therefore, the undersigned Board Member would limit claimant to the 42% permanent partial whole body disability she was awarded at the settlement in April 2004.

BOARD MEMBER

DISSENT

Claimant has failed to prove that her work-related injuries are now worse than what they were when she settled her claim. She has further failed to prove that her current condition is a direct and natural consequence of her original work-related injuries.

It is significant that none of the physicians that treated claimant have opined that she is unemployable. To the contrary, the work restrictions placed on claimant by every treating physician and by every examining physician, other than perhaps Dr. Murati's, are not so onerous as to preclude claimant from engaging in substantial and gainful employment.

[23] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[24] *Storey v. The Boeing Company*, No. 1,021,169, 2008 WL 375791 (Kan. WCAB Jan. 24, 2008).

This Board Member would find that claimant has failed to prove "that the [agreed] award is . . . inadequate or that the functional impairment or work disability of the employee has increased."[25]

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ryan Weltz, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[25] K.S.A. 44-528(a).